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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 94

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS,

vs.

STORER BROADCASTING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 23, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

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1-15-45

Before the

Federal Communications Commission

Washington, D. C.

Docket No. 8967

In the Matter of The Amendment of Sections 3.35, 3.240, and 3.640 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations.

RESPONSE TO NOTICE OF PROPOSED RULE MAKING AND REQUEST FOR ORAL ARGUMENT—September 27, 1948

Come now Paramount Pictures, Inc., Balaban and Katz Corporation, Paramount Television Productions, Inc., New England Theaters, Inc., United Detroit Theaters Corporation, and Gulf Theaters, Inc., hereafter referred to collectively as "Respondents" and respectfully represent to the Commission as follows:

1. No power to make and promulgate the proposed regulation is conferred upon the Commission by Sections 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended or otherwise; on the contrary the Commission is expressly prohibited from taking such action by section 9(a) of the Administrative Procedure Act (5 U.S.C. 1008(a)). The imposition by regulation of a numerical limitation on the number of broadcast stations which can be owned and operated by any person without regard to areas and populations served is, in a legal sense, arbitrary and capricious and repugnant to the general statutory standard established by the Communications Act.

2. In the event that the Commission concludes that it has authority to promulgate the rule now proposed it should not, as a matter of policy, now limit to five the maximum number of commercial television broadcasting stations which can be owned and operated by any person. Neither the Commission's allocation policies nor the public acceptance and support of commercial television broadcasting service has now advanced to a point where such a limitation is either necessary or desirable.

46 Before the

Federal Communications Commission

Washington, D. C.

[Title omitted]

STATEMENT OF OBJECTIONS—September 27, 1948

The following statement, filed pursuant to paragraph 4 of the Commission's Notice of Proposed Rule Making in the above-styled matter released August 19, 1948, is submitted for the Commission's consideration in opposition to the adoption of paragraph (a)(3) beginning with the third sentence of the said paragraph and paragraph (b) of the Multiple Ownership Rule proposed in the Notice of Proposed Rule Making.

I

The portion of the proposed Rule which begins, "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, * * *", and thereafter lists a maximum number of AM, FM and TV stations which may be controlled by one person or group of persons, is contrary to the letter, spirit and purpose of the Communications Act of 1934. Congress delegated to the Commission the duty of exercising its judgment on each application for broadcast facilities coming before it to determine whether the applicant possesses certain "statutory" qualifications and whether a grant of the application would serve the public interest, convenience and necessity. To insure the observance of this duty, Congress specifically required that no application could be denied without a full and fair hearing. Past Commission action and decisions, as well as the first part of the proposed Rule in the instant proceeding, recognize that, with respect to "concentration of control", each application must be decided on the merits of the individual cases before
47 it. Thus, in *In re Applications of Lubbock County Broadcasting Co. and Plains Radio Broadcasting Co. (KFYO), Lubbock, Texas* (Dockets No. 7334 and 7335), 4 RR 493, the Commission said in paragraph 15: "We have consistently decided each case involving multiple ownership on its own merits, considering all pertinent factors." The portion of the proposed Rule herein considered represents a departure from this policy in that the Commission proposes to state definitely at this time that applications for broadcast facilities by persons whose broadcast interests have reached the maxima set forth in the proposed Rule will not be judged by the Commission on all the facts of each case but will be summarily and routinely denied or dismissed because the sched-

ple of maximum of station interests permissible under the proposed Rule would be exceeded by a grant of such applications.

The aforesaid provision of the proposed Rule represents an attempted abdication by the Commission of its statutory duty to exercise its administrative discretion on the merits of each application before it. This characterization is not true only if it is assumed that the Commission can now foresee all of the permutations and combinations of circumstances with respect to multiple ownership which may arise and be presented to the Commission in future applications. Such assumed omniscience and prescience might enable the Commission to say that, when the limits of multiple ownership stated in the proposed Rule have been attained, the public interest could never be served by licensing broadcast facilities to a person whose broadcast interests meet the maximum limits stated. The inability of the Commission in the past, along with all other qualified experts in the field of radio broadcasting, to forecast with any degree of accuracy the future developments in AM, FM, and TV broadcasting, should in itself serve to show that the Commission cannot now undertake rigidly to limit its perspective on multiple ownership at arbitrary points with any assurance that it has considered all aspects of the problem—which exist now or which may arise in the future. It also seems clear that whenever any substantive problem or policy question can be solved by the adoption of a rigid rule it is no longer a problem for a flexible administrative agency but one which should be solved by statutory promulgation. It is also axiomatic that Congress alone has the power to declare that there is no longer any need for the exercise of administrative discretion with respect to a particular problem, and Congress has not done so as long as the standard of public interest, convenience, and necessity remains in the statute. The Commission cannot detract from its administrative obligations any more than it can add to its administrative powers.

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II

The foregoing argument is in itself sufficient reason for not adopting the portion of the proposed Rule with respect to which objection is raised. The soundness of the argument can, however, be substantiated effectively by the statement of a few situations with which the Commission might well be faced if the proposed Rule were adopted. In accord with the burden of the preceding argument it should be remembered, however, that the following examples are not offered and should not be considered as the products of an exhaustive investigation of the multiple ownership problem such as to exclude the possibility of many other unstated situations equally or more vexing.

a. Conflict with Section 307(b) of the Communications Act.

Section 307 (b) of the Communications Act states:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

It is well established and recognized in decisions of the Commission that this Congressional mandate means that, if applicant A applies for broadcast facilities in community A which are mutually
49 conflicting with an application by B for community B, all other things being equal, the application for the town with inferior broadcast service will be granted. Suppose, now, that applicant A owns seven AM broadcast stations whereas B is a newcomer to radio broadcasting, but that town A is clearly inferior to town B with respect both to transmission and reception of standard broadcast services. Applicant A would be preferred to applicant B if the consideration of multiple ownership were excluded. Would or could the Commission legally disregard the Congressional mandate of Section 307(b) because the application of A violated the proposed multiple ownership Rule formulated by the Commission? It is submitted that it could not.

Again, suppose that an applicant for broadcast facilities in a community where there is a demonstrated demand for broadcast facilities of the type sought is not opposed by a competing applicant, that the application conforms to the requirements of the Communications Act and of the Commission's Rules and Standards in all respects, excluding the proposed multiple ownership Rule. Would or could the Commission legally deny the application in the face of the provision of Section 307(b) that "* * * when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, * * *". It is submitted that it could not.

b. Conflict with Policy of Promoting Competition.

Suppose that there is only one broadcast station of any type located in a given community and that a person who owns the maximum number of such stations permitted by the proposed Rule applies for a station of the same type in the same community. Can the Commission state now, without looking at all the facts of the case, that a grant of the application which would provide the first competing broadcast service in the community, could not under any

circumstances better serve the public interest than a denial of the application on the grounds of multiple ownership? Bearing in mind that the present multiple ownership Rule (Section 3.35) has as its *raison d'etre* the preservation and stimulation of competition among broadcast stations (See Decision in *Hugh O. Jones, et al tr/as WGCM Broadcasting Co., Biloxi, Mississippi*, (Docket No. 6881, 3 RR 956) and that a denial of the application in the instant hypothetical case would promote monopoly, it is submitted that the Commission cannot now undertake in advance to deny such an application without regard to the particular facts.

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c. Conflict with General Duty to Provide Broadcast Service to Public.

Suppose that there is no station in a community utilizing the type of broadcast facilities sought by a person whose other broadcast interests have attained the maxima stated in the proposed Rule and suppose further that there is a great demand in the community for the operation of such a station but that no other applicant has come forward. Can the Commission now state, without forehanded knowledge of all the facts bearing on the demand and its fulfillment, that the public interest would be better served by denying such an applicant and community of the facilities requested, under the provisions of the proposed Rule, than by a grant of the application? Without reference to the legal argument made in the discussion *supra* with respect to Section 307(b) of the Communications Act in a similar situation, it is apparent that a summary and predetermined denial or dismissal of such an application is contrary to logic, the principle of reasonableness, the standard of public interest, convenience, and necessity, and the general duty of the Commission to allow broadcast service to be provided for all the citizens of the country.

d. Conflict with General Purpose of Comparative Consideration of Competing Applications.

Suppose that, of two mutually exclusive applicants, applicant A already possesses the maximum number of broadcast interests listed in the proposed Rule and that applicant B has not. Suppose further that, while A and B are both legally qualified applicants, A proposes to render a superior broadcast service while B proposes to render a marginal service. Can the Commission now state that the public interest would be better served by denial of A's application and a grant of B's application irrespective of any facts which might be presented with respect to the needs of the listening audience, the disparity between the proposed services, and the methods and practices employed by A in conducting the affairs of the other

stations which he controls? It is submitted that the Commission cannot legally condemn the potential audience to inferior service in so cavalier a manner and term the result to be "in the public interest."

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III

The specific numbers selected by the Commission in stating the absolute limitation on multiple ownership in AM, FM and TV broadcasting are completely arbitrary and bear no reasonable relation to the object desired to be accomplished. Nowhere has the Commission indicated the basis for selecting the limitations of 7, 6 and 5 for multiple ownership of AM, FM and TV stations respectively. It is submitted that the present opportunity to oppose the adoption of the proposed Rule is meaningless until and unless the Commission states the basis of its choice of numerical limits and without a statement of such basic reasons, it appears that the procedural requirements of Sections 4(a) and 4(b) of the Administrative Procedure Act have not been complied with by the subject Notice of Proposed Rule Making in respect of the specific limits proposed to be imposed.

Nor has the Commission stated the general purpose of curtailing "concentration of control" except in situations involving overlap of service areas and the resultant possibility of reduced competition. It seems probable, however, that the proposed Rule is concerned with either programs and/or the ability of persons controlling several stations to bargain coercively with respect to goods and services in the field of broadcasting. If these suppositions are correct, the arbitrary limitations of the proposed Rule appear to be inept and unlikely to correct the supposed abuse. What combination of eight AM stations, seven FM stations, or six TV stations could approach the control of programs exercised by the large networks? Indeed, the disparity is so great as to raise the question of equal application of the law, or at least of ordinary fairness and equality of treatment of all persons. As for the coercive powers which the Commission may feel accompany multiple ownership, is it not true that the owner of two or three stations can engage in such practices while the owner of seven stations may not? Is there any reason to a rule which says

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that an application for broadcast facilities by a person who owns six AM stations will be judged with respect to "concentration of control" on the facts of the particular case whereas an application by a person owning seven AM stations will "in any event" not be evaluated on the facts but will be condemned as seeking to attain "concentration of control contrary to the public interest, convenience or necessity * * *"? Until the Commission can produce facts in support of its proposed Rule the im-

position of specific limitations must be considered arbitrary and capricious.

The flaws in the proposed Rule described above cannot be ameliorated by permitting the amendment or waiver of the proposed Rule. Such exceptional devices place an unconscionable burden of proof on an applicant to refute a rule which may not have any reasonable basis and would therefore be as difficult to refute as to support. Perhaps even more important, the mere adoption of the proposed Rule would be a deterrent to the filing of applications for broadcast facilities which might serve the public interest even though the Commission would be willing to consider amendment or waiver of the Rule.

IV

It appears from the proposed Rule itself that any limitation on interests "less Than Control" are arbitrary restrictions on investments beyond the scope of the Commission's authority. By definition, "The Word 'control' as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised." (Footnote 1 of Appendix to subject Note of Proposed Rule Making.) The portion of the proposed Rule concerned with "the Maximum Number of Stations with Interest less Than Control" must, therefore, be irrelevant to whatever purpose the Commission has in attempting to curtail "concentration of control", since such minority interests cannot affect control. In this respect, the adoption of the proposed Rule would 53-59 be beyond the scope of the Commission's delegated statutory authority.

V

The difference between the position taken in this statement and the position exemplified by the proposed Rule is another facet of the old and recurring argument concerning the proper measures for control of the *possibility* of abuse of power. At one time the cliche, "The power to tax is the power to destroy" held full sway over American Jurisprudence—only to be shattered by the more pithy epigram, "The power to tax is not the power to destroy while this court sits".[1] The analogy is obvious. The Commission is evidently concerned at the possibilities of injury to the public interest which might be caused by excessive "concentration of control" over broadcast facilities—in other words, at the possibilities of abuse of whatever power accrues in the broadcasting world through ownership of many stations. But abuse of such power, not the possibility of abuse, is the danger to be feared

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[1] Mr. Justice Holmes in *Panhandle Oil Co.* v. *Mississippi Ex. Rel. Knox* (1928) 277 U. S. 218, 223.

and controlled. The proper solution to the problem can be summed up by paraphrasing the remark of Mr. Justice Holmes and declaring, "Not while this commission sits." Let the Commission strike at the substance of abuses to the public interest rather than at their shadows which can grow shorter and disappear as well as lengthen and grow darker. The process of case to case decision, though more tedious, rather than the simpler method of regulation by restriction, would better serve to prevent such abuses as the Commission may have in mind.

Respectfully submitted,

ARTHUR W. SCHARFELD.

752 National Press Building
Washington, D. C.
September 27, 1948

* * * * * * * * *

60 Before the Federal Communications Commission

Washington, D. C.

[Title omitted]

A STATEMENT BY THE FORT INDUSTRY COMPANY AND ITS SUBSIDIARIES CONCERNING THE PROPOSED AMENDMENT OF SECTIONS 3.35, 3.240 AND 3.640—September 27, 1948

The Fort Industry Company, on its own behalf and on behalf of its subsidiaries, namely, West Virginia Broadcasting Corporation, Monongahela Valley Broadcastnig Company, Liberty Broadcasting Corporation and Detroit Broadcasting Company, files this statement concerning the proposed amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations and gives notice of its intention to appear in the above proceeding in the event that a public hearing is held on the matter.

I

The Fort Industry Company and its subsidiaries, hereinafter referred to as The Fort Industry Company, are of the opinon that the proposed amendments should not be adopted in the form set forth.

II

The proposed amendments contemplate limiting any person who either directly or indirectly owns, operates or controls seven standard broadcast stations to the ownership, operation or control of six FM broadcast stations and five Television broadcast stations

(Section 3.35 (a) (3) as proposed). In those cases where the licensee owns fewer than seven standard broadcast stations, the corresponding ownership of FM and Television stations is proportionately reduced. The basis for the proposed limitations is that otherwise there would exist a concentration of control contrary to the public interest, convenience and necessity.

III

The Fort Industry Company considers that public interest, convenience and necessity would be served best if the proposed amendments permitted the ownership of the same number of FM 61-125 stations and Television stations as standard broadcast stations. In other words, a person should have the opportunity to own, operate or control the same number of FM stations and the same number of Television stations as the number of standard broadcast stations which that person directly or indirectly owns, operates or controls.

IV

The proposed limitation on the ownership of FM and television stations is not practical. It will result in multiple owners of standard broadcast stations being prevented and barred from progressing with the art in so far as FM and Televison are concerned. The Commission should be aware of the fact that, among the radio broadcasting industry, it is not considered unlikely that FM and Television broadcasting could and may ultimately occupy a more prominent position than standard broadcasting in the field of radio broadcasting. If and when such a condition should exist, the proposed amendments, if adopted, could be a reason for those standard broadcasting facilities of a person owning a multiple number of stations, which are not augmented with FM and television facilities, becoming valueless and the owner thereof being injured irreparably with respect to property and financial loss. It is inconceivable that any regulatory instrumentality which would either encourage or make possible such a condition could be considered to be in the interest of public interest, convenience or necessity and for the benefit of the public.

126-131 Before the Federal Communications Commission at Washington, D. C.

OFFICIAL REPORT OF PROCEEDINGS—January 17, 1949

Docket No. 8967

In the matter of: The Amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations relating to Multiple Ownership of AM, FM and Television Broadcast Stations

* * * * * * *

132-151 ORAL ARGUMENT OF PARAMOUNT PICTURES, INC., AND ASSOCIATED COMPANIES

By Mr. D. M. PATRICK:

Mr. PATRICK: If the Commission please, Paramount Pictures, Inc., and its subsidiary and associated companies Balaban and Katz Corporation, Paramount Television Productions, Inc., New England Theatres, Inc., United Detroit Theatres Corporation, and Gulf Theatres, Inc., desire to present three points in connection with the proposed multiple ownership rule now under consideration as it respects the television industry. They desire first to question the basic authority of the Commission to promulgate a rule of this character under the terms of the statutes involved, namely, Communications Act of 1934, as amended, and the Administrative Procedure Act. Secondly, they desire to question the exercise of policy involved in the adoption of a rule of this kind at this time in view of the formative state of the television industry and the allocation problems which have as yet not been determined. Finally, they desire to make certain suggestions concerning the meaning and application of the proposed rule and particularly paragraph (c) of that rule in view of the factual situation which now exists and which may exist effecting the above-named companies.

* * * * * * *

152-174 ORAL ARGUMENT OF COLUMBIA BROADCASTING SYSTEM

By Mr. JOSEPH REAM:

Mr. REAM: Mr. Chairman, and members of the Commission: At the argument today I would like to bypass many of the areas which have been the subject of a great deal of discussion and argument both formally before the Commission and informally within the industry. Accordingly, if it is agreeable with the Commission, I will not touch upon such questions as the authority of the Commis-

sion to issue rules as proposed, or any rules which purport to set standards for station ownership by fixed numbers; or the whole question of possible conflict between fixed limitations and the much broader question of qualifications of licensees and the record of their performance in serving the public interest; or the inapplicability of the antitrust laws as a support for a fixed limitation.

* * * * * * * * *

175 ORAL ARGUMENT ON BEHALF OF FORT INDUSTRY COMPANY

By MR. PAUL A. O'BRYAN:

In the opinion of the Fort Industry Company the proposed amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations relating to multiple ownership of AM and FM and Television Broadcast Stations described in docket No. 8967 should not be adopted in the form set forth. The Fort Industry is concerned primarily with the manner in which Docket No. 8967 proposes to limit the number of FM and Television Stations which may be operated by one person.

My argument will not consist of a recitation of legal decisions designed to attack the legality of the proposed amendment, but it will consist in enunciation of the illogicalness and impracticability of the proposed amendment in so far as it seeks to limit the number of FM and Television stations which may be owned, operated or controlled by one person.

The Fort Industry Company considers that public interest, convenience and necessity would be served best if the proposed amendment permitted the ownership of the same number of FM stations and television stations as standard broadcast stations.

176-180 In other words, a person should have the opportunity to own, operate or control the same number of FM stations and the same number of television stations as the number of standard broadcast stations which that person, directly or indirectly, owns, operates or controls; provided, of course, that in all other respects the person is legally, technically and financially qualified to own and operate such number of stations.

* * * * * * * * *

181 COLLOQUY

THE CHAIRMAN: Could I assume that your argument would support the Commission fixing an equal number of stations in each of these fields, FM, Television and AM?

MR. O'BRYAN: Of course, Mr. Chairman, we would hate to see that condition exist.

The CHAIRMAN: I am talking now about the principle of the argument.

Mr. O'BRYAN: The principle of the argument is that the number of FM facilities and number of Television facilities which one has should be able to match the number of broadcast stations, standard broadcast stations.

The CHAIRMAN: Whether that is 5 or 7 or not, so far as the principle of your argument is concerned, it should be matched?

Mr. O'BRYAN: Yes.

The CHAIRMAN: The question is then bringing the FM and television facilities, so far as Fort Industry is concerned, up to the maximum you now own in the AM field to 7?

Mr. O'BRYAN: That is correct, Mr. Chairman.

182 The CHAIRMAN: What is the justification for that, rather than reducing the 7 to 5?

Mr. O'BRYAN: May I counter with a question, sir?

The CHAIRMAN: You might, but I do not know that I will answer it.

Mr. O'BRYAN: I would first want to know the justification for reducing the 7 to 5.

The CHAIRMAN: It seems to me you pose the question one way, and in the question I pose it is quite as logical in the other direction. I cannot see the difference in the problem, as to whether it should be 5 or 7. How do you arrive at the number? Why do you think 7 is the sound number?

Mr. O'BRYAN: I don't necessarily say 7 is the sound number. If it is determined by the Commission that the maximum number of standard broadcast stations which a licensee may have is 8, then, as I have argued thus far, our feeling would be that the licensee should be permitted to have 8 FM stations and 8 television broadcast stations, if he elected to invest his money in them.

* * * * * * *

183 ORAL ARGUMENT ON BEHALF OF JOHNSON-KENNEDY RADIO CORP.

By MR. THOMAS N. DOWD.

Mr. DOWD: Before starting with reference to the immediate problem facing Johnson-Kennedy Radio Corporation I should only like to suggest that the dilemma which appears to be posed by the Commissioner's question to Mr. O'Bryan as to why it should be 5 rather than 7 could somehow be answered by the fact

184-188 that any rule which the Commission should impose that is against common sense would be arbitrary and therefore there would be as much justification for one as the other.

* * * * * * *

189-344 ORAL ARGUMENT ON BEHALF OF KMMJ, INCORPORATED, SALT LAKE CITY BROADCASTING CORPORATION, TRANS-AMERICA TELEVISION CORPORATION AND UNIVERSAL BROADCASTING COMPANY

By Mr. JAMES A. MCKENNA.

Mr. MCKENNA: My argument falls in two parts: First of all, the Commission lacks authority to adopt these rules, and second, even if it had the authority it would be an unwise exercise of policy to adopt it.

The notice of proposed rule-making states that the proposed rules are being issued under the authority of Sections 303 (r), 311, 313 and 314 of the Communications Act.

This specification of authority is apparently made pursuant to the requirement of Section 4 (a) of the Administrative Procedure Act which provides that general notice of proposed rule-making shall be given and that such notice shall include "reference to the authority under which the rule is proposed."

I have assumed, therefore, that the Commission has specified the full statutory authority on which it relies, and that unless the rules come within the authority, the Commission lacks jurisdiction to adopt them in this proceeding. This is not intended to suggest, by inference, that authority to adopt the rules may exist under other provisions of the Communications Act.

* * * * * * * *

345 FCC 48-1968
24954

Before the Federal Communications Commission
Washington, D. C.

Docket No. 8967

In the Matter of

The Amendment of Sections 3.35, 3.240 and 3.640 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations.

NOTICE OF PROPOSED RULE MAKING

1. Notice is hereby given of proposed rule making in the above-entitled matter.

2. The Commission proposes to amend Section 3.35, 3.240 and 3.640 of its Rules and Regulations in the manner set forth in the attached Appendix.

3. The proposed rules are issued under the authority of Sections 303(r), 311, 313 and 314 of the Communications Act of 1934.

4. Any interested person who is of the opinion that the proposed amendments should not be adopted, or should not be adopted in the form set forth, may file with the Commission on or before September 27, 1948, a written statement or brief setting forth his comments. Persons desiring to support the rule may also file comments by the same date. The Commission will consider all comments, briefs and arguments presented before taking final action with respect to the proposed rules.

6. Fifteen copies of each brief or written statement should be filed as required by Section 1.764 of the Commission's Rules and Regulations.

FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE,
Secretary.

Adopted: August 18, 1948
Released: August 19, 1948

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APPENDIX*

3.35 Multiple Ownership—(a) No license for a standard broadcast station shall be granted to any person (including all persons under common control [1]) if

(1) such person directly or indirectly owns, operates, or controls another standard broadcast station located in the same community or in another community in the same metropolitan district or if such person directly or indirectly owns, operates, or controls another standard broadcast station with a substantial overlap in the service area of such stations. In determining what constitutes substantial overlap consideration will be given to the facts of each case with particular reference to such factors as the classes of stations involved, geographic extent of overlap, location of centers of population, distribution of population, other competitive service to the overlap area, location of trade areas, metropolitan districts, and political boundaries; areas and populations to which the service of the station directed (as indicated by commercial business of the station, news broadcasts, sources of programs and talent, nature of programs, coverage claims, and listening audience), and location of main and secondary studios: or

---

* The proposed provisions of Sections 3.240 and 3.640 relating to multiple ownership of FM and Television broadcast stations are not set forth in the Appendix. They are the same as Section 3.35 except as noted.

[1] The word "control" as used herein is not limited to majority stock ownership but includes actual working control in whatever manner exercised.

(2) such person or any stockholder, officer or director of such person directly or indirectly owns any interest in, or is an officer or director of, another standard broadcast station located in the same community or in another community in the same metropolitan district; or

(3) such person, or any stockholder, officer or director of such person, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a cocentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the
347 number of people served, classes of stations involved, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for a person directly or indirectly to own, operate or control more than seven standard broadcast stations,[2] or for any person or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than fourteen standard broadcast stations.[3]

If such person controls directly or indirectly fewer than seven standard broadcast stations (referred to in the table below as "Number of Stations Controlled") or if such person or any of its stockholders, officers or directors have a direct or indirect interest in or are stockholders, officers or directors of fewer than fourteen standard broadcast stations (referred to in the table below as "Number of Stations with Interest Less than Control) the maximum limitation shall be as follows:

If the Number of Stations Controlled Is	Then the Maximum Number of Stations with Interest Less Than Control May Be:
7	0
6	1 or 2
5	3 or 4
4	5 or 6
3	7 or 8
2	9 or 10
1	11 or 12
0	13 or 14

[2] Six in the case of FM and five in the case of Television.

[3] Twelve in the case of FM and ten in the case of Television.

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For FM

The Table is as Follows

6	0
5	1 or 2
4	3 or 4
3	5 or 6
2	7 or 8
1	9 or 10
0	11 or 12

For TV

The Table is as Follows

5	0
4	1 or 2
3	3 or 4
2	5 or 6
1	7 or 8
0	9 or 10

(b) In applying the provisions of subsection (a) hereof to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

(c) The effective date of this rule shall be postponed until January 1, 1953, for existing situations which are in conflict with the rule in order to permit the orderly disposition of interests. This extension will not be applicable to any case where complete disclosure of all facts was not made to the Commission on or before August 19, 1948.

FCC 53-1570
97842

Before the Federal Communications Commission
Washington 25, D. C.

Docket No. 8967

[Title omitted]

349

Report and Order

By the Commission: Commissioner Hennock concurring in part and dissenting in part and issuing a statement.

1. This proceeding involves a proposal to amend Sections 3.35, 3.240 and 3.636 (formerly 3.640) of the Commission's Rules and Regulations which relate respectively to multiple ownership of AM, FM and television broadcast stations.

2. The proceeding was instituted by the issuance of a Notice of

Proposed Rule Making on August 19, 1948 (13 F.R. 5060). The following parties submitted written comments with respect to the proposed amendments and also participated in the oral argument held before the Commission *en banc* on January 17, 1949: Paramount Pictures, Inc., Balaban and Katz Corporation and Gulf Theatres, Inc. (the "Paramount group"); Columbia Broadcasting System, Inc.; the Fort Industry Company; KMMJ, Inc., Salt Lake City Broadcasting Corporation, Trans-America Television Corporation and Universal Broadcasting Company (the "McKenna group"); and National Broadcasting Company, Inc. In addition, written comments were submitted by Mr. E. B. Craney and Mr. Arthur W. Scharfeld.

3. The parties to this proceeding have raised numerous objections to the proposed amendments. These objections fall generally into two categories. The first group challenges the authority of the Commission to adopt rules of general applicability dealing with the subject multiple ownership of broadcast stations, while the second group objects to specific provisions of the proposed amendments. We shall first take up the arguments of the former group.

4. There has been general agreement among the parties to this proceeding that in order to guard against monopolistic tendencies and to preserve competition in the broadcasting industry the Commission can and should, in the exercise of its licensing functions, give consideration to the multiple ownership of stations. Nevertheless, it has been argued that the Commission must announce the general principle of law governing the multiple ownership of broadcast stations on a case-to-case basis only and that the Commission is here precluded from issuing rules of general ap-
350 plicability. This argument, however, fails to consider the specific rule making powers conferred on this Commission by the Communications Act,[1] and the consistent rulings of the courts

[1] Section 4(i) provides:

"(i) The Commission may perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

Section 303(r) provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall——

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"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may

sustaining the rule making powers of this Commission, as well as other government agencies.[2] Under the Communications Act, the Commission has full authority to adopt rules giving effect to the principles that will apply in licensing radio stations pursuant to the statutory touchstone of "public convenience, interest and necessity." Such rules are designed to implement and enforce the Act and to announce publicly Commission policy with respect to factors which may warrant a denial of a license because they are incompatible with the policies and purposes of the Act. The rule making powers conferred on the Commission, expressly set forth in Sections 4(i) and 303(r) of the Act, not only authorize the adoption of rules but affirmatively direct the Commission to make such regulations as may be necessary to carry out the provisions of the Act. In addition to its rule making powers, the Commission may proceed on a case-to-case basis so that the policies and purposes of the Act will be implemented within the framework of particular cases. The choice between these alternative techniques
351 for the implementation of the Act must be determined in light of all the relevant considerations presented by the particular problem. The Supreme Court in *Securities and Exchange Commission* v. *Chenery Corp.* 332 U.S. 194, 203-204, stated:

> ". . . an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
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> ". . . There is thus a very definite place for the case-by-case evolution of the statutory standards and the choice made between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the

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be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

[2] *National Broadcasting Company* v. *United States*, 319 U.S. 190 affirming 47 F. Supp. 940; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 420-421; *Heitmeyer* v. *Federal Communications Commission*, 68 App. D.C. 180, 95 F. (2d) 90; *Ward* v. *Federal Communications Commission*, 71 App. D.C. 166, 108 F. (2d) 486; *cf. Stahlman* v. *Federal Communications Commission*, 75 App. D.C. 176, 126 F. (2d) 124; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Lichter* v. *United States*, 334 U.S. 742.

administrative agency. See *Columbia Broadcasting System* v. U. S., 316 U.S. 407, 421."[2a]

Our determination here that the problems presented by the multiple ownership of broadcast stations are best resolved by the promulgation of rules of general applicability is made on the basis of the knowledge and experience acquired by this Commission over a period of more than a decade in the handling of these problems.[3]

5. The provisions of Sections 3.35, 3.240 and 3.636 governing the multiple ownership of broadcast stations and the amendments thereof proposed in this proceeding were promulgated pursuant to the general rule making authority contained in Sections 4(i) and 303(r) of the Act and are designed to implement the Congres-
352 sional policy against monopoly enunciated specifically in Sections 311 and 313 of the Communications Act. Parties to this proceeding have urged that the promulgation of these rules by this Commission is an attempt to enforce the anti-trust laws of the United States which function Congress has delegated to the Department of Justice. This contention has been advanced before, and expressly rejected by the courts. Thus, in *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 U.S. App. D.C. 102, 180 F. (2d) 28, the court stated:

> "Appellant argues that this amounts to enforcement of the anti-trust laws. But whether appellant has been guilty of a violation of these laws is not here in issue. The fact that a policy against monopoly has been made the subject of criminal sanction by Congress as to certain activities does not preclude an administrative agency charged with furthering the public interest from holding the general policy of Congress to

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[2a] In at least three cases in recent years the courts have expressly rejected arguments that the Federal Communications Commission should act on a case-by-case basis rather than by adopting general rules specifying in advance the circumstances, under which it will or will not grant licenses. *National Broadcasting Company* v. *Federal Communications Commission*, 319 U.S. 190 (Chain Broadcasting Regulations); *Felman* v. *United States*, (N.D. Ill., Civil No. 49 C 227, *aff'd*, 339 U.S. 973 (Reserve time Rules); *American Broadcasting* v. *U. S.* (110 Supp. 374 (S.D. N.Y.)) (Lottery Rules).

[3] In 1940 the Commission adopted a multiple ownership rule for FM broadcasting stations (5 F.R. 2384); multiple ownership rules for television were adopted in 1941 (6 F.R. 2284); multiple ownership rules for AM broadcasting stations were adopted in 1943 (8 F.R. 16065). These rules have been reported to Congress and discussed in hearings but Congress has never taken action to abolish or circumscribe the Commission's authority to issue such rules.

be applicable to questions arising in the proper discharge of its duties. * * * Monopoly in the mass communication of news and advertising is contrary to the public interest, even if not in terms proscribed by the anti-trust laws."[4]

6. Nor do we find merit in the contention that Section 9(a) of the Administrative Procedure Act, 5 U.S.C., Section 1008, which provides that "no sanction shall be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law", prohibits the adoption of these rules. The legislative history of Section 9(a) leaves no doubt that the Section was not intended to prevent an agency from adopting rules which it would be otherwise authorized to issue but was merely designed to "afford statutory recognition for the basic rule of law embodied in judicial decisions." Senate Judiciary Committee Print, June 1945, in Sen. Doc. No. 248, 78th Cong. 2d Sess., p. 34.[5]

353 7. The objections advanced by the parties to this proceeding against the specific provisions of the amended rules are considered below.

8. We need not here take up those arguments directed to the overlap and allied provisions of the outstanding proposal (subsections (1) and (2)). We have determined not to effectuate, at this time, any changes with respect to overlap. We recognize that some changes may well be desirable, but recent developments, particularly in television,[6] compel reconsideration of the entire overlap question. While certain features of the outstanding proposal are unrelated to these developments and would appear to

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[4] See also *National Broadcasting Company* v. *United States*, 319 U.S. 190; *Southern Steamship Company* v. *National Labor Relations Board*, 316 U.S. 31.

[5] The Attorney General's Manual on the Administrative Procedure Act makes it clear that the purpose of Section 9(a) was to prevent administrative agencies from imposing sanctions or adopting substantive rules which had not been specifically or generally authorized by Congress. See also Senate Report on S. 7 in Sen. Doc. 248, 79th Cong. 2d Sess., p. 211, and House Report on S. 7 in Sen. Doc. 248, 79th Cong. 2d Sess., p. 274.

[6] Involved here is the question of determining the extent of overlap—that is, the population and area encompassed by the overlap. As brought out in the Sixth Report and Order (pars. 85, 88, 90, 91) and several recent cases (*In re Application of Westinghouse Stations, Inc.*, 8 Pike & Fischer RR 381; *In re Application of Louis Wasmer*, 9 Pike & Fischer RR 713), this presents a particularly difficult problem in television because of the technical data available and the rules drafted on the basis of such limited data.

merit adoption, it is felt that such a piecemeal approach is inappropriate. Accordingly, we take no action here changing the present provisions of our rules governing overlap situations.

9. We turn now to the objections to the proposed provisions which deal with the total number of stations in which a licensee should be permitted to have an interest. The proposed rules provide that the determination whether the grant of a license would result in a concentration of control of broadcasting facilities inconsistent with the public interest will depend on the facts of each case; and the factors which the Commission will consider in making that determination are set forth with particularity. It is further provided that the Commission will consider the ownership, operation or control directly or indirectly of more that 7 AM, 6 FM or 5 TV broadcast stations by any person to constitute a concentration of control contrary to the public interest. It is also provided that no person or any of its stockholders, officers or directors may have a direct or indirect interest in or be stockholders, officers or directors of more than 14 AM, 12 FM or 10 TV broadcast stations. Tables are also included in the rules which specifically set forth the maximum number of stations in which any person
354 or its stockholders, officers or directors may have interests less than control.

10. One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis. See *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470. This Commission has consistently adhered to the principle of "diversification" in order to implement the Congressional policy against monopoly and in order to preserve competition. That principle requires a limitation on the number of broadcast stations which may be licensed to any person or to persons under common control. It is our view that the opefation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees. The vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service. Simply stated, the fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest. In this connection, we wish to emphasize that by such rules diversification of program services is furthered without any governmental encroachment on

what we recognize to be the prime responsibility of the broadcast licensee (See Section 326 of the Communications Act). It is to effect this purpose that the foregoing specific limitation on the number of stations that may be owned, operated or controlled by any person, has been included in the multiple ownership rules.[7]

11. In view of the arguments advanced by some parties that the proposed rules are arbitrary in that they give no effect to class and size of stations, geographical locations, populations served, and similar factors, we have considered alternatives to the outstanding proposal.[8] But as a result of a study of the present holdings of multiple owners, we have concluded that any proposal to limit multiple ownership on the basis of such factors as class of station or geographical location, is either unsatisfactory or unworkable.[9] For a formula, which we believe would reasonably limit ownership on such bases, would require extensive divestment of holdings by existing licensees; it is felt that this would be unduly disruptive. On the other hand, if existing licensees are to retain their present holdings, no formula can be devised which does not substantially extend the present maximum limitation on station ownership—a result felt to be completely unwarranted in view of the important policy considerations involved. As to devising a reasonable formula and "grandfathering" present holdings however greatly excess of this new criterion, this is believed improper in view of the extensive multiple AM holdings and the nature of such holdings built up over that service's long history

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[7] Such limitations have been in effect for the FM and TV service since the multiple ownership rules for those services were adopted. The original limit of three television stations was subsequently raised to 5 in the light of changed conditions.

[8] *In the Matter of Bruntonet al.*, 3 Pike & Fischer RR 291. On the basis of the facts in that proceeding, the Commission considered and gave weight to such factors as the class and power of stations in determining whether the requested transfer of an additional station to CBS would be in the public interest. The Commission's decision in that proceeding does not, however, preclude the adoption under appropriate circumstances of rules of general application such as are involved here.

It should also be noted that even if all the AM stations owned by the one party are small, there is a tendency to concentrate in the same general area; under these circumstances, ownership of more than 7 stations would result in a concentration of control that would be contrary to the public interest.

[9] It is important to note that the proposed rules do take these factors into consideration in situations not involving an application for facilities in excess of the maximum permissible number.

and the consequent unfairly preferential treatment accorded such multiple owners. We conclude, therefore, that the method employed in our outstanding proposal is the only sound and workable one because of the history and present development of the broadcast industry.

12. As stated, the outstanding proposal equates two minority non-controlling holdings with one full or controlling ownership.

356 In view of the contention made that the proposal is objectionable because of this effort to deal with interests less than control (e.g., that "[it] endeavor[s] to reduce to simple mathematical formulae matters that are incapable of such reduction"), we have re-examined this facet of the matter. It is our conclusion that the principle of diversification and the realities of the situation require that no distinction be made between a minority non-controlling interest and a full or controlling one. While the holder of a small interest in many instances may have slight influence on the operation of the station in question, it is also true such a person can exert a considerable influence—to an extent clearly within the objectives and purview of the described diversification policy. Several factors should be noted here: (1) there may not be a correlation between the size of the minority holding and the extent of the influence wielded; (2) it is impossible to determine on the face of the application what the influence of the multiple owner will be; indeed, it may be difficult or incapable of definite ascertainment even in a subsequent hearing; and (3) in the case of the holder who has interested himself in numerous stations, there is a good probability that because he is so actively engaged in the broadcast field, his influence will tend to be a positive or substantial one. For these reasons, we are of the opinion that to permit parties to acquire interests of any nature in more than the specified maximum numbers of stations set out within would tend to defeat the diversification policy. We have accordingly revised the multiple ownership rules so as to preclude such holdings.[10]

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[10] We note that some parties who now have television interests in five stations which include some of a minority nature, have applied for additional television facilities, presumably relying on the absence of any specific provision dealing with minority holdings. We feel that such parties, who may have gone to considerable expense and otherwise relied on the policy prevailing before this change, should not be penalized procedurally by the immediate dismissal of their applications. Therefore, parties who have applied for interests in excess of five before the date of adoption of this rule change and whose applications—because their holdings involved minority interests—were not defective under 1.36(c) or

357 13. Section (a)(3) of the attached rules is also concerned with the interests that any stockholder, officer or director of a party applying for a license may have in other stations. Objections have been raised to the consideration of the interests of those who are only officers or directors but not stockholders of applicants or licensees. Such objections, however, ignore the practical realities of business organization and control, particularly in the case of corporations. In numerous business organizations the actual day to day control is in the hands of officers and directors who are not necessarily owners or stockholders. Reference need only be made to the history of the antitrust laws to discover the consequences which may flow from interlocking directorships and managements. And it is significant that Congress has inserted provisions in the antitrust laws specifically to guard against evils resulting from the interlocking interests of directors, officers and even employees of business organizations. See 15 U.S.C., Sections 19, 20. In light of these considerations, the Commission believes that it is both reasonable and necessary to take cognizance of the interests of directors and officers of licensees and applicants in order to preserve competition and prevent monopoly in the broadcasting field.

14. With respect to stockholders, Section (b) of the proposed rules provides that in applying Section (a) in the case of corporations having more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who own 1% or more of the outstanding voting stock. It has been suggested that only holders of 5% or more of the stock of such corporations should be considered. The Commission is of the opinion, however, that the provision as originally proposed should be adopted for the reason that in corporations of large size, owners of 1% of the stock may have considerable voice in the control and management; and that interests of that size should properly be considered in the application of these rules.

15. Neither the present nor proposed rules on limiting multiple

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inconsistent with other pending applications of the party within 1.362, may, if they desire, continue to prosecute their applications by a request for waiver of either 1.362 or 1.361(c). It should be clearly understood that the waiver thus granted is a procedural one only, permitting the parties involved to continue in their hearings or other processing procedure; the holdings of such parties, whether minority or controlling, must conform to the maximum number established in the rules here adopted. It follows that a grant to such a party bringing its interests to six would be conditioned on divestment of some other interest.

ownership in TV make any distinction between VHF and
358 UHF stations. The Commission has received several peti-
tions [11] requesting that such a distinction be made, and that
either no limitation be placed on the ownership of UHF stations or that the limitation on TV holdings be raised to either 7 or 8 with no more than five in the VHF service. This argument rests on the premise that such action is desirable in order to promote the early development of UHF. Oppositions to these proposals have also been submitted.[12] The opponents argue that the proposed liberalization of the ownership limitation with respect to UHF stations is not in the public interest and that "If it appears that UHF is not developing as rapidly as desired, and if smaller communities are not being served by television, and if no other solution is in sight, there will be time enough to take such a drastic step as has been suggested." The Commission is now actively engaged in studying the position of the post-freeze TV station. We note that other interested parties are also engaged along this line.[13] Accordingly, we are deferring consideration of the multiple ownership facet of the UHF question to the over-all UHF study.

16. We turn now to what is the appropriate specific limitation in each service on the number of stations in which one person may hold an interest. The attached rules continue in effect the existing limitation on TV station ownership which, in our judgment based on extensive experience with the problems of multiple ownership, have proven practicable and desirable. It is argued that the rules should permit the ownership of the same number of TV stations as AM since TV operations now need to be buttressed by the profits of the AM operation while the latter may need such service from the former in the future. But the period when television operations
359 were largely supported by AM profits has passed, and television stations, by and large, are either now operating at a profit or can reasonably look forward to such operation in the future. As to the converse argument, it is believed that restrictions on multiple ownership should be related to the circumstances of the present and immediate future rather than to some remote or possible set of circumstances in the indefinite future. In

[11] These petitions were filed by the National Broadcasting Company, Inc., American Broadcasting Company, Inc., and Allen B. DuMont Laboratories, Inc.

[12] The opposing parties are Senator Edwin C. Johnson, Redwood Broadcasting Co., Fairmount Broadcasting Co., and New England Television Company.

[13] See e.g., the petition of the newly formed Ultra High Frequency Television Association dated October 27, 1953.

the absence of circumstances which we do not now foresee, we believe that the policy of diversification requires the adoption of the 5 station limitation.[14]

17. With respect to interests in FM broadcast stations, the attached rules, unlike the proposal which specified a 6 station FM limitation, raise the limitation to seven—the AM figure. It is considered desirable to have the same limitation applicable to both aural services because of their inter-relationship and the present status of FM's growth.[15]

18. The specific limitation on the holding of interests in excess of seven AM broadcast stations is a new provision of the Commission's Rules on multiple ownership. Aside from the factors set out in the prior paragraph, the greater potential of FM as compared to AM for the accommodation of broadcast stations might have justified a more severe limitation in AM than the limitation imposed in FM. It was determined, however, to limit the holdings in AM stations of any one person to seven in order that present holdings of such stations be not unduly disrupted. The specific limitation of 7 stations contained in the attached rule is consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved almost en-
360 tirely within the framework of that limitation: only a very few parties have holdings in excess of 7. As to these latter few, orders to show cause why they should not divest themselves of so much of their holdings as is necessary to bring about conformity with the subject rule, will be issued. Decision as to whether or not divestment will be required will be made on the basis of the arguments adduced and the factors involved in each case.

19. In view of the above considerations, we find that the public interest, convenience and necessity will be served by the adoption of the attached rules. Authority for their adoption is contained

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[14] The argument is also made that no cogent reasons exist for the disparity in TV and AM multiple ownership rules in view of the fact that the TV station potential is approximately equivalent to the AM station number. But there is a substantial disparity between the number of *existing* AM and TV stations. Further, as brought out in paragraph 18, the AM figure of 7 was selected because of the tremendous expansion which has been achieved within the framework of that limitation; a lower figure would result in either severe disruption or, in the event of "grandfathering," preferential treatment being accorded too many licensees. No such consideration pertains to the determination of the TV figure.

[15] The most recent statistics available (January 1, 1953) show that of 600 FM broadcast stations, 538 are owned by AM licensees and for the most part, duplicate the AM programming.

in Sections 4(i), 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended.

20. Accordingly, It is Ordered, this 25th day of November, 1953, that, effective 30 days after publication in the Federal Register, Sections 3.35, 3.240, and 3.636 of the Commission's Rules and Regulations are amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,*

WM. P. MASSING,
Acting Secretary.

(Seal)

Attachments
Appendix
Released: November 27, 1953.

APPENDIX

Section 3.35 *Multiple Ownership*—No license for a standard broadcast station shall be granted to any party (including all parties under common control [12]) if

(1) such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation; or

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(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of station involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control con-

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* See Separate Views of Commissioner Hennock attached.

[12] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

trary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.[13]

[13] In applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

Section 3.240 · *Multiple Ownership*—No license for an FM broadcast station shall be granted to any party (including all parties under common control [13]) if

(1) such party directly or indirectly owns, operates, or controls another FM broadcast station which serves substantially the same service area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other FM broadcast station if the grant of such license would
362 result in a concentration of control of FM broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven FM broadcast stations.[13a]

[13a] In applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

[13] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control [9]) if

(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or

(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served,
363 and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessary for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.[9a]

(b) Paragraph (a) of this section is not applicable to noncommercial educational stations.

Separate Views of Commissioner Hennock Concurring in Part and Dissenting in Part

I concur in the Commission's action to the extent that it adopts the rule limiting multiple ownership to seven AM seven FM and five TV stations. I disagree, however, with the following aspects of the Report and Order:

1) Footnote 10 appended to paragraph 12 of the Report and Order;

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[9] The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

[9a] In applying the provisions of paragraph (a) of this section to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1% or more of the outstanding voting stock.

2) The decision not to adopt at this time specific provisions governing overlap situations; and

3) The failure to provide a definite geographic limitation on the number of stations in which a person may have an interest.

1. Footnote 10 states that there are some parties who have interests in five television stations, which include some of a minority nature, who have applied for additional television facilities presumably relying on the absence of any specific provisions dealing with minority holdings. The footnote permits these parties to continue to prosecute their applications by a request for waiver of either Section 1.362 or 1.361 (c) of our Rules. It is pointed out that a waiver thus granted would be procedural in nature, merely permitting the parties involved to continue their hearings or other processing procedures; that the interests of
364 such parties, whether minority or controlling, must eventually conform to the maximum number established in the Rules adopted today; that a grant to such a party, bringing its interests to six television stations, would accordingly be conditioned on divestment of some other interest.

I strongly disapprove of this exception. It will result in permitting a TV applicant who is also a TV licensee, while prosecuting the application, to retain his existing interests, even though, if his application is granted, the resulting multiple ownership situation would be contrary to our Rules and would have to be adjusted through divestment.

In the past in the analogous cases we have consistently refused to permit such a practice. I have reference to the cases arising under Section 1.371, footnote 10, subsection 2 (c). This Rule reads:

> "An application by a licensee or a permittee of a television broadcast station which seeks to modify an outstanding license or permit to specify a channel other than that authorized in said license or permit will not be accepted for filing by the Commission with the exception of applications filed pursuant to Commission show-cause orders."

The purpose of this rule is to prevent an applicant from "standing astride" two channels at the same time, and the Commission has recognized that this is "a reasonable procedural method of implementing both the purpose of Section 3.636 (multiple ownership) and the equitable and efficient processing of applications." (In re the petition of *The Vindicator Printing Co.*, 8 Pike & Fischer R.R. 328). We have consistently, and rightly so, refused to waive this rule. Yet today the Commission has seriously undermined the rationale of its position. For, the parties to whom footnote 10 of this Report and Order applies will

be doing the very thing the quoted rule is intended to prevent—straddling two channels at the same time.

But even apart from the foregoing, I deem footnote 10 of the Report and Order to be legally unsound. It is axiomatic that even licensees have no vested right in their authorizations. They are bound by new rules which we adopt in the public interest.
365 Yet, here the Commission intimates that applicants may have such a right in their applications, because they "may have gone to considerable expense and otherwise relied on the policy prevailing before this change." This is bad law and worse policy. The Commission should not feel restrained in adopting rules in the public interest by the fact that such rules may adversely affect an applicant. I am not aware of any compelling public interest considerations that would require the Commission to afford such special treatment to the applicant or applicants who will benefit from this provision.

2. With respect to the overlap problem, I feel that this is the appropriate time to adopt specific standards governing the overlap situation especially so in television, and with respect to that service I would issue an appropriate proposal toward that end. The purpose of the multiple ownership rule is to prevent undue concentration of ownership of the mass media of communications. The overlap rules are an integral part of the rules directed toward effectively achieving this objective. The rules in effect today were adopted long before the Sixth Report and Order became effective. Their inadequacy to cope with overlap situations was recognized five years ago when the Notice of Proposed Rule Making in this proceeding was first issued. Yet today the Commission has, in effect, reaffirmed them. And it has done so in spite of the experience we have gained from the proceedings in Docket 8736 *et al.* and recent cases before us, which have conclusively proved, time and time again, that the available tools are too unreliable to deal realistically with TV overlap problems on a case-by-case basis.[1] We are not serving the public interest by refusing to face this problem now. Our failure to do so will undoubtedly result in a further regional concentration of ownership of media of mass communications, with its well known consequences of (a) limiting competition, (b) adversely affecting the diversification of control over the services of

[1] See e.g. pars. 88 and 91 of the Sixth Report and Order; *In re Applications of Westinghouse Radio Stations, Inc.*, 8 R.R. 381 and my Separate Views therein; cf. Sec. 3.683 of the Rules.

programs to the television public, (c) causing excessive con-
366 centration in the dynamic TV field, and (d) seriously threat-
ening the capacity of other licensees to compete effectively.

3. The rules adopted today contain an upper limit on the number of stations in which a party may have an interest. This in my opinion is not enough. For, it seems clear to me that an interest in less than the permitted maximum number of stations, concentrated in one state or a given geographical region, may often have a more deleterious effect on competition and constitute a more stifling concentration, than the ownership in excess of the permitted maximum scattered throughout the United States. Under the rules adopted today we will continue the practice of dealing with the problem of regional concentration on a case-by-case basis. If this were a new problem I would agree with this method. But having the benefit of experience I deem it inadequate. For, when faced with the problem of Regional monopolies, the Commission has repeatedly failed to give it a careful and mature consideration that it deserves.[3] I would limit the ownership, in TV at least, to not more than one station in any state or geographical region which may be considered as an integrated economic unit and would issue now an appropriate Notice of Proposed Rule Making with a view to accomplishing this result. I realize that such a rule, if adopted, would necessitate divestitures of some existing interests. But the benefit which would accrue to the public would far exceed any private inconvenience.

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[2] See my dissent to the grant to E. Anthony & Sons, Inc., Boston, Mass., Public Notice 88265, March 26, 1953.

[3] See my Dissents to the grant to Utah Broadcasting and Telecasting Corp., Public Notice 88265, 3/26/53; and to Southern Idaho Broadcasting and Telecasting Company, Public Notice 88098, 3/19/53; and my Dissent in GWAL, Inc., 9 R.R. 110, 119.

367 In the United States Court of Appeals for the District of Columbia Circuit

No. 12,065

STORER BROADCASTING CO., *Petitioner*

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

To the Honorable Judges of the United States Court of Appeals for the District of Columbia:

Storer Broadcasting Company (hereinafter referred to as Storer), presents this, its petition for judiciary review of a final order of the Federal Communications Commission, and in support thereof represents as follows:

I

Nature of the Proceedings

1. Storer seeks to review and set aside an order of the Commission entered in proceedings entitled, "In the Matter of the
368 Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations" (Order Serial No. FCC 53-1570, Docket 8967, adopted November 25, 1953 and released November 27, 1953). These proceedings were initiated on August 19, 1948 by the issuance of a Notice of Proposed Rule Making (13 F.R. 5060).

2. As amended by this Order, the Multiple Ownership Rules now provide that ownership of any interest in more than seven (7) Standard (AM) Radio; seven (7) FM Radio and five (5) Television Broadcast Stations will be considered by the Commission, without regard to any other fact or circumstance, to constitute a concentration of control contrary to the public interest, convenience or necessity.

3. The prohibition established by the Amended Rules is absolute and extends to the officers, directors and stockholders of controlling corporate interests. The concept of "control," in respect of corporations, in not limited to majority voting stock interests, and in the case of corporations having more than fifty stockholders, all officers, directors and all holders of one (1%) per cent or more of

the voting stock are, by definition, within the prohibition of the Rules.

4. Authority to promulgate the Order amending the Multiple Ownership Rules is stated by the Commission to be derived from Sections 4(i), 303(r), 311, 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C.A. § 151 *et seq.*

5. Sections 4(i) and 303(r) of the Act confer general authority upon the Commission to issue and Promulgate regulations not inconsistent with law, which may be necessary or desirable to effectuate provisions of the Act.

6. Section 313 makes applicable to interstate and foreign radio communications, all laws of the United States relating to unlawful restraints of trade and monopoly, and confers upon the court
369 of jurisdiction, authority and discretion to revoke the broadcast license of any person adjudged guilty of violating the anti-trust laws, in addition to the imposition of other penalties or sanctions.

7. Section 311 directs the Commission to refuse a license or permit to any person whose license or permit has been revoked by a Court under authority of Section 313.

8. Section 314 prohibits the acquisition, ownership or control of radio broadcast stations or facilities by common carriers, the purpose or effect of which is to substantially lessen competition, unlawfully restrain commerce, or unlawfully create monopoly in commerce.

9. A copy of the Commission's Report and Order (to which the Amended Rules are attached) is attached to this petition as Appendix A.

Statement of Jurisdiction

10. This Court has jurisdiction over the subject matter of this petition under Section 4 of the Judiciary Review Act of 1950 (5 U.S.C.A. § 1031-1042); Section 402(a) of the Communications Act of 1934, as amended (47 U.S.C.A. § 151-609); and Section 10 of the Administrative Procedure Act of 1946 (5 U.S.C.A. § 1009).

11. As appears from the Commission's Report and Order, Exhibit A hereto attached, Storer was a party to the Rule Making Proceedings in Docket 8967; filed comments and presented oral arguments to the Commission *en banc*, in opposition to the Rules as proposed.

12. Storer is a "party aggrieved" by reason of the Commission's Order within the meaning of Section 4 of the Judiciary Review Act of 1950, and is further a "person suffering legal wrong" and a "person adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10 of the Administrative Procedure Act of 1946.

370 Facts Upon Which Venue Is Based

13. Storer (formerly the Fort Industry Company) is a corporation organized and existing under the laws of the State of Ohio, having its principal place of business in Miami, Florida. Storer owns and operates, under license of the Commission, five (5) standard radio broadcast stations; five (5) FM radio broadcast stations, and three (3) television broadcast stations.

14. Storer also owns all of the capital stock of (a) San Antonio Broadcasting Company, a Texas Corporation having its principal place of business in San Francisco, Texas, and (b) Birmingham Broadcasting Company, Inc., an Alabama Corporation, having its principal place of business in Birmingham, Alabama. Each of these corporations respectfully owns and operates, under license of the Commission, one (1) standard radio broadcast station and one (1) television broadcast station.

15. Under the Multiple Ownership Rules of the Commission, Storer is deemed to be the owner and in "control" of seven (7) standard radio, five (5) radio, and five (5) television broadcast stations, under license of the commission, as follows:

Radio Broadcast Stations

Call Letters		Location
WGBS	WGBS-FM	Miami, Florida
WSPD,	WSPD-FM	Toledo, Ohio
WJBK,	WJBK-FM	Detroit, Michigan
WWVA,	WWVA-FM	Wheeling, West Virginia
WAGA,	WAGA-FM	Atlanta, Georgia
WBRC		Birmingham, Alabama
KABC		San Antonio, Texas

371 Television Broadcast Stations

Call Letters	Location
WSPD-TV	Toledo, Ohio
WJBK-TV	Detroit, Michigan
WAGA-TV	Atlanta, Georgia
WBRC-TV	Birmingham, Alabama
KEYL-TV	San Antonio, Texas

16. On August 31, 1953, Storer exhibited and filed its application with the Commission for construction permit for a new television broadcast station to be operated on Channel 10 in Miami, Florida. In its application Storer represented that if would accept a grant of Channel 10 in Miami, upon the express condition that it divest itself of any and all interest in one of its presently owned television

broadcast stations to achieve compliance with existing Multiple Ownership Rules. On November 25, 1953 (coincident with adoption of its Order amending the Multiple Ownership Rules) the Commission adopted a Memorandum Opinion and Order (Serial No. FCC 53-1563) dismissing Storer's application as being in conflict with the spirit and purpose of the Multiple Ownership Rules. A copy of the Memorandum Opinion and Order is attached to this petition as Appendix B.

17. Approximately twenty (20%) per cent of Storer's voting stock is publicly owned and held by more than 1200 stockholders in twenty-three states. Storer's voting stock is traded on the "over-the-counter" market and is bought and sold daily by the public through licensed dealers in securities. Storer has no present or future control over whether or not:

(a) Any public holder of one (1%) per cent or more of its voting stock, now or hereafter possesses or acquires any interest, directly or indirectly, in any other standard radio or television broadcast station, or

372 (b) Any person now or hereafter owning, or in control of any other standard radio or television broadcast station (or any officer or director or holder of one (1%) per cent or more of the voting stock of any other corporation owning radio or television broadcast stations) now is or hereafter becomes a holder of Storer voting stock.

18. Storer is adversely affected and aggrieved by the Order of the Commission adopted on November 25, 1953, amending the Multiple Ownership Rules, in that:

(a) Storer is denied the right of a full and fair hearing to determine whether its ownership of an interest in more than seven (7) standard radio and five (5) television broadcast stations, in light of and upon a showing of all material circumstances, will thereby serve the public interest, convenience and necessity.

(b) The acquisition of Storer's voting stock by the public under circumstances beyond the control of Storer, may and could be violative of the Multiple Ownership rules, as amended, and result in a forfeiture of licenses now held by Storer, with resultant loss and injury to Storer and to all other Storer stockholders.

Points Relied Upon As the Basis for Relief

19. The points relied upon as a basis for relief are as follows:

(1) The Rules are unsupported by statutory authority and erroneously construe and apply the provisions of Sections 311, 313.

and 314 of the Communications Act of 1934, as amended, from which they are stated to derive.

(a) Application of the Anti-Trust Laws to the radio broadcast industry does not authorize or permit the Commission to
373 create an absolute numerical proscription against the ownership of interest in radio and television broadcast stations.

(b) Numerical proscription necessarily characterizes ownership of an interest in excess of the prescribed limit as being a specie of monopoly and illegal *per se*.

(c) The Rules, in defining concentration of control contrary to the public interest by absolute numerical proscription, have created a novel measure of the Anti-Trust Laws and in so doing have usurped judicial functions reserved solely to the Courts.

(2) The Rules conflict and are inconsistent with the statutory mandate that the Commission grant applications for radio and television broadcast stations if the public interest, convenience or necessity will be served thereby.

(3) The Rules, in denying the right to make application for radio and television broadcast stations and to have a hearing thereon as prescribed by statute, constitute a denial of due process of law under the Fifth Amendment of the Constitution.

(a) In creating an absolute numerical proscription, the Commission has established a conclusive presumption that ownership in excess of the prescribed limit is unlawful.

(b) Numerical proscription, having no rational relationship to the National Anti-Trust policy, is a denial of due process.

(4) The Rules, in considering the ownership of one (1%) per cent or more of the voting stock of a broadcast licensee corporation as equivalent to ownership, operation or control of the station, are unreasonable and bear no rational relationship to the national Anti-Trust policy.

(a) The existence of "control" must be determined by the facts and circumstances in each individual case.

374 Relief Prayed For

20. Wherefore, Petitioner respectfully prays:

(1) That upon final hearing and review, this Court will, by appropriate Order, Judgment or Decree, forthwith set aside and declare unlawful and without force or effect, the Order of the Commission adopted November 25, 1953 in Docket 8967, together with the

Multiple Ownership Rules promulgated thereby, insofar as and to the extent that said Order and Multiple Ownership Rules;

(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity.

(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control contrary to the public interest, convenience or necessity.

(2) That the Court will grant such other or further relief as to this Court appears meet and just.

Respectfully submitted,

STORER BROADCASTING COMPANY,
By (Signed) THOMAS H. WALL,
Dow, Lohnes and Albertson,
Munsey Building,
Washington 4, D. C.,
Telephone: Sterling 3-1000,
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375 *Of Counsel*
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Bay Harbor Island
Miami Beach 41, Florida

Dated: January 22, 1954

Duly sworn to by John E. McCoy. Jurat omitted in printing.

376 [Appendix A attached to the Petition for Review, the Report and Order of the Commission, Docket No. 8967, is not printed here but appears at pages 349 through 366 of this Joint Appendix]

Appendix B Attached to Petition for Review

Before the
Federal Communications Commission
Washington 25, D. C.

FCC 53-1563

97834

In re Application of

Storer Broadcasting Company
Miami, Florida

For Construction Permit for
New Television Broadcast Station

MEMORANDUM OPINION AND ORDER

By the Commission:

Commissioner Hennock not participating.

1. The Commission has before it a "Motion to Dismiss", addressed to the subject application and filed on September 8, 1953, by WKAT, Inc., an applicant for Channel 10 in Miami. An "Opposition to Motion to Dismiss" was filed on September 14, 1953 by Storer Broadcasting Company.

2. Storer is the licensee of WJBK-TV in Detroit, WSPD-TV in Toledo and WAGA-TV in Atlanta. In addition, it owns 100% of the stock of the licensees of KEYL (TV) in San Antonio and WBRC-TV in Birmingham. It thus owns or controls the maximum number of television stations permitted under common ownership by Section 3.636(b) of the Commission's Rules. The subject application for Channel 10 in Miami contains representations and agreements by Storer that, in the event its application is granted, Storer will divest itself of all interest in one of the existing television stations it owns or controls, and that it will accept a grant of the application subject to the express condition that it divest itself of all interest in one of the said stations. Storer describes its application, however, as "not contingent".

377 3. Immediately prior to Storer's acquisition of control of the Birmingham station, it owned or controlled the other

four stations listed in paragraph "2", above. In addition, it had pending television applications for channels in Wheeling, West Virginia-Steubenville, Ohio, and in Miami, Florida. WSTV, Inc., Storer's competing applicant in Wheeling-Steubenville, petitioned the Commission and requested that Storer be directed to elect which of its pending applications it desired to prosecute. In a Memorandum Opinion of January 29, 1953, we held that Storer's applications for Miami and Wheeling-Steubenville were inconsistent and conflicting with each other within the meaning of Section 1.362 of our Rules.[1] However, we viewed the participation by Storer in a pending rulemaking proceeding (Docket 8967) (in which it urged that Section 3.636 (b) [2] be amended to permit the ownership of at least seven television stations by any person) as a request for waiver of or exception to the multiple ownership rules within the meaning of Section 1.361 (c) [3] of our Rules, and, ac-

[1] Section 1.362 *Inconsistent or conflicting applications.* When an applicant has an application pending and undecided, no other inconsistent or conflicting application filed by the same applicant, his successor or assignee, or on behalf or for the benefit of said applicant, will be considered by the Commission.

[2] Section 3.636 *Multiple Ownership.* (b) No person (including all person under common control) shall, directly, or indirectly, own, operate, or control more than one television broadcast station, except upon a showing (1) that such ownership, operation, or control would foster competition among television broadcast stations or provide a television broadcasting service distinct and separate from existing services, and (2) that such ownership, operation, or control would not result in the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity: *Provided, however,* That the Commission will consider the ownership, operation, or control of more than five television broadcast stations to constitute the concentration of control of television broadcasting facilities in a manner inconsistent with public interest, convenience, or necessity.

[3] Section 1.361 *Defective applications.* (c) Applications which are not in accordance with the commission's Rules, Regulations or other requirements will be considered defective unless accompanied either (1) by a petition to amend any rule or regulation with which the application is in conflict, or (2) by a request of the applicant for waiver of or an exception to, any rule, regulation or requirement with which the application is in conflict. Such request shall show the nature of the waiver or exception desired and set forth the reasons in support thereof. [This rule reads as it did prior to amendment on November 4, 1953].

cordingly, we did not then require Storer to elect which of
378 its two applications it wished to pursue or, failing such election, dismiss the latest filed of the two applications. We thus retained both of Storer's applications on file pending final determination of the rulemaking proceeding previously referred to, pointing out, however, that such retention did not require the suspension of the processing of any applications competing with its Wheeling-Steubenville application, the later filed of its two applications. That case being one of first impression, we afforded Storer a period of 30 days to elect which of the two applications it wished consideration be given. *In re Applications of WSTV, Inc., et al.*, 8 Pike and Fischer R. R. 854. Thereafter, and after our denial of Storer's petition for reconsideration and stay (9 Pike and Fischer R. R. 175), Storer requested dismissal of both the Wheeling-Steubenville and the Miami applications, and acquired control of the Birmingtón station:

4. In requesting that the Storer application not be accepted for filing, petitioner (WKAT) alleges, in general, that the application is fatally defective in that it is in contravention of Section 3.636(b); that, if the proposal is permitted to stand, it will nullify the multiple ownership rule and reduce the Commission's orderly processes in considering competitive television applications to a state of chaos; that hearing processes would become more protracted by the addition of other parties to the proceeding and that applicants could file in excess of five applications, representing, only, that they would surrender any construction permits in excess of the number permitted by the Commission's Rules; that Storer does not present to the Commission at this time a plan of divestment which can be assessed by the Commission; that there is no assurance whatever that Storer can divest itself of one of its holdings and that, if it could, that the transferee thereof would be qualified under the Communications Act as a licensee; and that the effect of the Commission's actions in dismissing the Wheeling-Steubenville application and the prior Miami applications were dismissals with prejudice.

5. In its opposition, Storer alleges, in general, that its statement concerning its intention to dispose of one of its present stations in the event of a grant of its Miami application constitutes an unequivocal proposal to comply with the multiple ownership rules; that it has an historical and current interest in serving the public of the Miami area; that the *WSTV, Inc.*, decision re-
379 quiring it to elect between two conflicting and inconsistent applications is not applicable to the instant case where there is but one non-conflicting application before the Commission; that the Commission has consistently found that a proposal to divest an existing station upon the grant of an application satisfies the the requirements of the multiple ownership rule in cases where

a conflict would otherwise exist; that it does not propose to own, operate or control more television stations than permitted by the Commission's multiple ownership rule; that compliance with the Commission's ownership rule does not require that a proposal to dispose of an existing station in the event of a grant be accompanied by all conceivable detail concerning such proposed disposition; and that it has filed a complete and proper application upon which it is entitled to a comparative hearing with other mutually exclusive applications.

6. As indicated above, we have held that Storer could not own *four* television station and prosecute applications for two additional stations. Storer now urges that it be permitted to own *five* television stations and prosecute its application for another station. Aside from the reasons set forth below, the illogic and untenability of Storer's position is apparent on its face. We are of the view that Storer's present proposal does more violence to the spirit and purposes of Section 3.636(b) than the proposal we considered in the *WSTV, Inc., decisions, supra.*

7. We agree with Storer's contention that there being but one application before us, it is not inconsistent with any other pending Storer application and that Section 1.362 of our Rules is not applicable. It is equally clear, however, that in our decision in the *WSTV, Inc.,* cases, we did not base our conclusions solely upon the above rule. In those cases, we were concerned also with the possible effect a contrary holding would have on the Commission's procedures for processing applications, particularly in the television service. As we stated in our first decision in 8 Pike and Fischer R. R. 854:

> "A contrary rule would permit applicants to flood this Commission's processing line and its hearing docket with multiple applications many of which could not be granted under the rules. Such multiple applications, if entitled to consideration, would delay the processing of applications which could otherwise be granted. Hearings would be required to be held on the applications of such multiple applicants in situations where we could not grant such applications. * * *"

We are of the view that while the above-entitled application is not inconsistent with any other Storer application within the meaning of Section 1.362 of our Rules, processing and consideration thereof by the Commission would be inconsistent with its holding in the *WSTV, Inc.,* decisions, with its policy enunciated thereunder, and with the spirit and purposes of Section 3.636(b) of our Rules.

8. Storer's proposal to accept a grant of its application on condition that it dispose of one of its five television stations merely repeats one of the proposals it offered when it held four stations

and had two applications pending before us. That proposal was rejected before, 9 *Pike and Fischer R. R.* 175, 178 (fn. 6), and we are of the view that it is untenable now. For, acceptance of this proposal would permit the owner of five television stations to file an unlimited number of applications on the grounds that each time we granted an application we could attach the proposed condition. This could go on *ad infinitum*, disrupt entirely our processing procedures, be manifestly unfair to competing applicants, delay a first or additional television service in a number of communities, and encourage trafficking in licenses. It is clear to us that to permit such a situation to exist would not be in the public interest.

9. Storer has cited a number of instances wherein the Commission granted construction permits or transfers of control conditioned upon the disposition of an existing station. It is to be noted, however, that those applications did not involve Section 3.636(b) of our Rules. Those were cases in which the applicant sought another station in the same community on condition that he would dispose of his existing station. They did not involve multiple applications, did not do violence to our processing procedures, did not involve competing applicants and did not delay the establishment of a first or additional service in the community. A more analogous reference would be the decisions we have issued pursuant to Section 1.371, footnote 10, subsection 2(c) of our Rules which read as follows:

> 381 "An application by a licensee or the permittee of a television broadcast station which seeks to modify an outstanding license or permit to specify a channel other than that authorized in said license or permit will not be accepted for filing by the Commission, with the exception of applications filed pursuant to Commission Show Cause Orders."

In applying Subsection 2(c), we stated *In re Petition of The Vindicator Publishing Company*, 8 *Pike and Fischer R. R.* 328:

> "Paragraph (k) [now 2(c)] has been adopted to effectuate the expeditious development of television pursuant to the Table of Assignments. It prevents the waste of valuable television channels by insuring that the holder of a construction permit will either proceed with its existing authorization, or make that channel available to others before seeking to institute proceedings looking towards a grant on another channel. Petitioner could not, of course, simultaneously be given a construction permit or license for two different channels in the same community (Section 3.636 of the Rules and Regulations). Petitioner does not challenge the validity of that basic rule. The rule which prevents an applicant from holding one channel

while trying to obtain another is clearly reasonable on its face.[4] It is a reasonable procedural method of implementing both the purpose of Section 3.636 and the equitable and efficient processing of applications. Nor is the rule shown to be inequitable in this situation. Petitioner seeks to do exactly what the rule is intended to prevent, namely to stand astride two channels at the same time. * * *

The analogy to Subsection 2(c), above, is pertinent since there, too, we were concerned with a situation where an applicant might "straddle" two channels, adversely affect our processing procedures, do inequity to other applicants, and delay television service in a community. In the *Vindicator* case, the permittee sought another channel in lieu of the one granted to it while there was a pending application for the unassigned channel. There was no proposal by
382 the permittee to cancel the existing authorization. We refused to accept its application, as we did *In re Application of Broadcast House Inc.* (FCC 53-1427), where there were four applicants for the unassigned channel. And *In the Matter of Amendment of Subsection 2(c) of Footnote 10 etc.*, (53-1426), we denied a petition to amend Subsection 2 (c) on grounds similar to those set forth in the *Vindicator* case.

10. With respect to petitioner's contention that our actions in dismissing Storer's Wheeling-Steubenville application and its prior Miami application were dismissals with prejudices, we are not in accord. Those applications were dismissed pursuant to Section 1.366 of our Rules which provides, in pertinent part, that "Any application may be dismissed without prejudice as a matter of right prior to the designation of such application for hearing". However, in light of the Commission's final determination of the rulemaking proceedings in Docket 8967, adopted the same date of this Memorandum Opinion and Order, in which the Commission did not adopt Storer's proposed amendment to Section 3.636 of its Rules, no basis exists for the retention of Storer's application in the Commission's pending files. Accordingly, it will be returned forthwith.

11. In light of the above, IT IS ORDERED, That the application of Storer Broadcasting Company for Channel 10 in Miami, Florida, IS DISMISSED.

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[4] Since the rule is procedural, notice of proposed rule making was not required. See Section 4(a), Administrative Procedure Act."

FEDERAL COMMUNICATIONS COMMISSION

WM. F. MASSING,
Acting Secretaary.

Adopted: November 25, 1953
Released: November 30, 1953

383 In United States Court of Appeals for the District of Columbia Circuit

Federal Communications Commission
Washington 25, D. C.
November 5, 1954

Address all communications to the Secretary

Joseph W. Stewart, Clerk
United States Court of Appeals for the
District of Columbia Circuit
Washington 1, D. C.

Re: Storer Broadcasting Company v. United States and the Federal Communications Commission, No. 12065

Dear Mr. Stewart:

At the argument on November 2, 1954 of the above-entitled case mention was made of the amendment of Section 3.636 of the Commission's Rules and Regulations to permit the acquisition of two additional UHF television stations. The pendency of the proposal was referred to on Page 9 of the Government's brief and its adoption mentioned on Page 11 of the petitioner's reply brief.

It would seem desirable for the Court to have the citation for the Rule in its present form. The Report adopting the amendment together with the text of the Rule as amended is printed at 19 F.R. 6099. The Rule also appears at 1 Pike & Fischer, Radio Regulation 53:632 and the Report at 11 Pike & Fischer, Radio Regulation 1519. I have informed counsel for the petitioner of my intention to submit this information and have been advised that there is no objection.

Sufficient copies of this letter are enclosed for the Court's use. It would be very much appreciated if you would transmit these copies to the Court. This seemed to me to be the most expeditious way of furnishing the citations.

Very truly yours,

DANIEL R. OHLBAUM

cc: Thomas H. Wall, Esq.
Dow, Lohnes & Albertson
Munsey Building
Washington, D. C.

384 [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,065

STORER BROADCASTING COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, and the FEDERAL COMMUNICATIONS COMMISSION, Respondents

Petition for Review of Order of the Federal Communications Commission

OPINION—Decided February 24, 1955

Mr. Albert R. Connelly, with whom Messrs. Thomas H. Wall and George B. Turner were on the brief, for petitioner. Messrs. Fred W. Albertson and Clair L. Stout entered appearances for petitioner.

Mr. Daniel R. Ohlbaum, Counsel, Federal Communications Commission, with whom Messrs. Warren E. Baker, General Counsel, Federal Communications Commission, and J. Smith Henley, Assistant General Counsel, Federal Communications Commission, were on the brief, for respondents. Messrs. Charles H. Weston, Attorney, Department of Justice, and J. Roger Wollenberg, Richard A. Solomon and Richard J. Snider, Counsel, Federal Communications Commission, entered appearances for respondents.

Before WILBUR K. MILLER, PRETTYMAN and BAZELON, Circuit Judges.

385 WILBUR K. MILLER, *Circuit Judge*: Storer Broadcasting Company filed with the Federal Communications Commission August 31, 1953, an application for a new television station in Miami, Florida. Storer was then already licensed to own and operate five standard broadcast and five frequency modulation broadcast stations, located in Atlanta, Detroit, Miami, Toledo and Wheeling; and three television stations, located in Atlanta, Detroit and Toledo. Its wholly-owned subsidiaries were then licensed to own and operate standard broadcast and television stations in Birmingham and San Antonio.

In a proceeding initiated some years before by issuance of a notice of proposed rule making, in which Storer participated, the Commission entered an order November 25, 1953, promulgating amended "multiple ownership" rules, which are now §§ 3.35, 3.240 and 3.636 of its Rules and Regulations. On the same day the Commission

dismissed Storer's application for a television station in Miami without a hearing and without consideration on the merits, on the ground that its grant would be in violation of the spirit and purpose of the multiple ownership rules.

Storer petitions for review, asking that we declare unlawful and without force or effect the Commission's rule making order of November 25, 1953, together with the amended multiple ownership rules promulgated thereby, insofar as and to the extent that the order and rules

> "(a) Deny the right to a full and fair hearing to determine whether ownership, operation or control of more than seven (7) standard radio, seven (7) FM radio, and five (5) television broadcast stations, upon application therefor, will serve the public interest, convenience or necessity
>
> "(b) Provide that ownership of one (1%) per cent or more of the voting stock of a corporation shall be considered as equivalent to ownership, operation or control of such station in determining the existence of a concentration of control
> 386 contrary to the public interest, convenience or necessity."

The multiple ownership rules are challenged here only insofar as they impose an absolute limitation upon the number of standard, FM and television broadcast stations which may be owned, operated or controlled by a single individual or corporation. The three rules under attack are similar except for the differing maximum numbers of stations which are permitted,—seven in standard, seven in FM, and five in television. We quote as typical the television broadcast rule, § 3.636:

> "Section 3.636 *Multiple Ownership*—(a) No license for a television broadcast station shall be granted to any party (including all parties under common control) if
>
> "(1) such party directly or indirectly owns, operates, or controls another television broadcast station which serves substantially the same area; or
>
> "(2) such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other television broadcast station if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with the public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, and the

extent of other competitive service to the areas in question. *The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.*" (Italics supplied. The italicized material is common to all three rules.)

387 Unequivocally, the foregoing rule declares that an application for a television broadcast station license filed by one who is already licensed for five such stations will be rejected; that the Commission will *in any event* consider that the addition of a sixth station would result in concentration of control contrary to the public interest, convenience or necessity.

This means, of course, that an application for a sixth television station will be denied without a hearing, just as Storer's application was rejected without a hearing and without any consideration of the question whether public interest, convenience or necessity would be served by the grant.

Section 309(a) of the Communications Act requires the Commission to grant an application for a station license if it finds, upon examination thereof, that public interest, convenience and necessity would be served by the granting thereof. If the Commission is unable so to find, after examining an application, it is required by § 309(b) of the Act to notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. It is further provided that, if the Commission, after considering the applicant's reply to its notice, is still unable to make a favorable finding and so is unable to grant the application without a hearing,

> ". . . it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue
388 specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant."

This is mandatory language. The Supreme Court said in *Ashbacker Radio Corp.* 1. F. C. C., 326 U. S. 327, 330 (1945):

> " . . . § 309(a) not only gives the Commission authority to grant licenses without a hearing, but also gives applicants a right to a hearing before their applications are denied. . . . "

Again, at page 333, the Court said:

> " . . . Congress has granted applicants a right to a hearing on their applications for station licenses. Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide. . . . "

Moreover, the denial of a hearing granted by statute is a denial of due process of law. *L. B. Wilson, Inc.* v. *F. C. C.*, 83 U.S. App. D.C. 176, 170 F. (2d) 793 (1948).

This does not mean, however, that any person who applies for any frequency at any location is entitled to a hearing before his application may be denied, for there are situations in which the Commission may reject an application without a hearing. For example, if an applicant admits he is an alien, his application will be denied without a hearing because he is disqualified by statute; or, if he denies he is an alien but is found to be such after a hearing conducted on that issue, his application will be dismissed without further hearing.

If an application seeks a license for an unlawful use or purpose, it will be rejected without a hearing. *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284 (1954).

Moreover, if an applicant applies for a certain frequency at a location to which that frequency has not been assigned, his application will be dismissed without a hearing as not conforming to the Commission's master plan—arrived at through one
389 master hearing—for the allocation of television frequencies, under which at least one television channel has been assigned to each of over one thousand cities and towns throughout the nation. The actual assignment of channels to operators is by application, but all applications for licenses not conforming to the overall plan are automatically dismissed. This plan was upheld by us in *Peoples Broadcasting Co.* v. *United States*, 93 U. S. App. D. C. 78, 209 F. (2d) 286 (1953), and in *Logansport Broadcasting Corp.* v. *United States*, 93 U. S. App. D. C. 342, 210 F. (2d) 24 (1954).

In the latter case we said, at page 345:

> "The fair interpretation of Sections 303 and 307 (b), when read together, is that the Commission may allocate channels among communities either by passing upon specific applications or by way of rule making. Situations are not infrequent

in which an administrative agency can properly proceed either through rule making or adjudication; in such a case, the choice 'is one that lies primarily in the informed discretion of the administrative agency.' Securities and Exchange Commission v. Chenery Corporation, 1947, 332 U. S. 194, 203, 67 S. Ct. 1575, 1580, 1760, 91 L. Ed. 1995. After its experience in distributing FM radio frequencies pursuant to an allocation plan, and distributing AM frequencies in response to specific applications, the Commission has decided that by means of an allocation plan a more equitable distribution of television channels can be effected. We do not think this was an abuse of discretion. . . ."

In the light of such exceptions to the apparently unqualified generality of § 309(b), the statutory provision means that any citizen who seeks a license for the lawful use of an available frequency has the undoubted right to a hearing before his application may be rejected.[1]

390 The rule in question here is not a mere announcement that the Commission has adopted the policy of considering, in every case in which the owner of five television stations applies for an additional license, whether the grant thereof would result in such concentration of control as to be adverse to the public interest. The rule goes further and says the Commission will "in any event" treat the numerical limit as the boundary of public interest, and will deny a hearing to the owner of five television stations upon his application for an additional station. Thus the Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided *in vacuo* that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.[2]

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[1] Cf. *Stahlman v. F. C. C.*, 75 U. S. App. D. C. 176, 126 F. (2d) 124 (1942).

[2] Cf. the *Stahlman* opinion, cited in footnote 1, in which Judge Groner said, at page 179:

"If in this case it had been made to appear, as counsel for appellant insist, that the Commission's investigation was solely for the purpose of the consideration or adoption of a hard and fast rule or policy, as the result of which newspaper owners may be placed in a proscribed class and thus made ineligible to apply for or receive broadcast licenses, we should

It is conceivable that in some circumstances, common ownership of even five television stations, though permitted by the challenged rule, might be undue concentration of control; while in other circumstances, common ownership of a greater number might be compatible with the public interest. But whether so or not must be determined on an *ad hoc* basis, after consideration of all factors relevant in the determination of whether the grant of a license would be within the comprehensive concept which the Act calls "the public interest, convenience, or necessity." Cf. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 89 U. S. App. D. C. 13, 189 F. (2d) 677 (1951), as to the broad scope of the concept. The selection of a certain number, such as five or seven, as a maximum beyond which no multiple owner will be permitted to go regardless of what he may be able to show in his own behalf, is not only inconsistent with but is contrary to the mandatory provisions of § 309(b) of the Act and, with respect to the applicants described in the rule, would in effect repeal or nullify that important section.

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The Commission argues that the challenged rules[3] carry out its established policy of encouraging as many qualified persons as possible to seek broadcast licenses, as the public interest requires maximum diversification of program and service viewpoints; and that they also carry out the general policy of favoring competition which Congress wrote into the Communications Act. The multiple ownership rules are, the Commission says, "therefore a formulation of *Commission* policy in the licensing of stations, which is based in part upon enunciated Congressional policy applicable to radio broadcasting." We are not here concerned with the Commission's *policy* in passing upon applications. We are concerned with what purports to be a binding rule.

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be obliged to declare that such an investigation would be wholly outside of and beyond any of the powers with which Congress had clothed the Commission. For we have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. 2d 564. Further consideration confirms that view."

[3] Although only § 3.636 of the Commission's Rules, concerning multiple ownership of television stations, is directly involved here; the parties have treated the case as though all three sections of the multiple ownership rules were under direct attack. As the challenged portion of § 3.636 appears *verbatim* in the other two sections, it would of course be held invalid should occasion arise to consider it on the complaints of multiple owners of AM and FM stations.

However laudable its policies may be, we have seen that the Commission is bound by its own statute and by the requirements of due process to grant a full hearing before denying an application for an available frequency sought by a citizen for a lawful use. We hold invalid the portion of § 3.636 of the Commission's Rules which we italicized in quoting it at length earlier in this opinion, and direct that it be eliminated therefrom. This holding will not prevent the Commission from considering in each case, in accordance with its announced policy, the question whether granting an additional license to one who is already a multiple owner would place too much control in one licensee, contrary to the public interest. But the multiple owner applicant must be given a chance in a hearing to show, if he can, that still another station will not give him such control of communications media as to prejudice the interests of the public.

This proceeding, being on petition for review of the rule making order of November 25, 1953, filed under § 402(a) of the Act, does not bring before us the order of the same date which denied the application of Storer Broadcasting Company for a television station license at Miami—which order was appealable under § 402(b). But, in view of our holding here, the Commission probably will *sua sponte* set aside the order of denial and grant Storer a hearing.

Challenged rule modified and case remanded.

393 [File endorsement omitted]

In United States Court of Appeals for the District of Columbia Circuit

No. 12,065

January Term, 1955.

STORER BROADCASTING COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

JUDGMENT—February 24, 1955

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On Consideration Whereof, it is hereby ordered and adjudged by this Court that the order of the Federal Communications Commission adopted November 25, 1953, so far as it amends Section 3.636 of its Rules and Regulations by including therein the following language:

> "The Commission, however, will in any event consider that there would be such a concentration of control contrary to the

public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations."

be, and the same is hereby, determined to be invalid, and that this case be, and it is hereby, remanded to the Federal Communications Commission with directions to eliminate the foregoing language from Section 3.636 of its Rules and Regulations.

Dated: February 24, 1955.

Per *Circuit Judge* WILBUR K. MILLER.

394 [File endorsement omitted]

In United States Court of Appeals

[Title omitted]

Before: EDGERTON, *Acting Chief Judge*, in Chambers.

ORDER STAYING ISSUANCE OF CERTIFIED COPIES OF OPINION AND JUDGMENT.—Filed March 15, 1955

Upon consideration of respondents' motion to stay issuance of certified copies of the opinion and judgment of this Court on the ground that respondents are considering applying to the Supreme Court of the United States for a writ of certiorari, and it appearing that petitioner has consented thereto, it is

Ordered by the Court that issuance of certified copies of the opinion and judgment of this Court in the above entitled case be, and it is hereby, stayed to April 11, 1955.

Dated: March 15, 1955.

395-396 Designation of Record (omitted in printing).

397 Clerk's Certificate to foregoing transcript omitted in printing.

398 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 94

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 955503 [illegible]